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No. _____

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IN THE

Supreme Court of the United States

HAROLD M. WIT and DONALD C. EBEL,

Petitioners,

—v.—

CAROL BERMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state law denying a local resident the right to register and vote in a local election solely because he is registered to vote in another locality where he also resides violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Plaintiffs-appellants below, and petitioners in this Court, are Harold M. Wit and Donald C. Ebel.

Defendants-appellees below, and respondents in this Court, are:

Carol Berman, Chairperson of the New York State Board of Elections

Weyman A. Carey, President of the New York City Board of Elections

Rosanna Rahmouni, Chief Clerk of the Manhattan Borough Office of the New York City Board of Elections

Eliot Spitzer, Attorney General of the State of New York

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PETITION FOR A WRIT OF CERTIORARI

Harold M. Wit and Donald C. Ebel, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 306 F.3d 1256 (2d Cir. 2002). The opinion is reprinted in Appendix A. The District Court dismissed petitioners' complaint after oral argument without issuing an opinion. *See* 306 F.3d at 1259. The order of the District Court is reprinted in Appendix B.

JURISDICTION

The Court of Appeals entered its judgment on October 11, 2002. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision at issue is the Equal Protection Clause of the Fourteenth Amendment: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The statutes at issue are provisions of New York's Election Law that limit the right to vote in local elections to local residents, N.Y. Elec. Law § 5-102(1); define "residence" as "*that place* where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." N.Y. Elec. Law § 1-104(22); and make it a

felony to "[r]egister or attempt[ ] to register" in more than one election district, to knowingly attempt to register "when not qualified," or to attempt to vote in an election "more than once." N.Y. Elec. Law §§ 17-104(1), (2), (5); 17-132(1), (3), (9).

The constitutional and statutory provisions are reprinted in Appendix C.

STATEMENT OF THE CASE

Facts

Harold Wit and Donald Ebel are long-time residents of New York City. Each maintains a home in New York City, pays income and property taxes in New York City, is listed in a telephone directory for New York City, uses his New York City residence for his personal financial statement, and spends a considerable portion of every year living in New York City. Both Mr. Wit and Mr. Ebel also meet the age and citizenship qualifications for voting in New York City. 306 F.3d at 1258.

Petitioners were once registered to vote, and did vote, in New York City. Each petitioner, however, also maintains a second home in Suffolk County in New York State—Mr. Wit in the town of East Hampton and Mr. Ebel in the town of Southampton. Each petitioner is currently registered to vote at that second home. Each would like to register to vote in New York City for New York City local elections while also maintaining his registration for all other elections at his Suffolk County home.

In June 2000 petitioners were advised by the New York City Board of Elections that under New York law they could not vote in New York City local elections while maintaining their Suffolk County registrations. As New York City residents, they could shift their regis-

trations from Suffolk County to New York City. But, they were told registration in two different locations—even though they were residents of both locations and sought to vote in only local elections at the second location—would be treated as election fraud.

Proceedings Below

The District Court: In June 2000, petitioners brought suit in the United States District Court for the Southern District of New York, claiming that the provisions of the New York Election Law barring them from voting in local elections in New York City solely because of their registration in another locality are unconstitutional under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. Petitioners also alleged that the ban on voting in local elections from both of their residences violated their rights under the New York Constitution. The District Court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343, 1367 and 42 U.S.C. § 1983.

In July 2000, before any discovery had been conducted, respondents moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On November 8, 2000, the district court (Hon. Alvin K. Hellerstein, District Judge) issued an order granting respondents' motion to dismiss. The district court did not issue an opinion.

The Court of Appeals: Petitioners appealed to the United States Court of Appeals for the Second Circuit, focusing on their federal Equal Protection Clause claim and dropping their Due Process and state constitutional claims. 306 F.3d at 1259, n.1. On October 11, 2002, the Second Circuit, in an opinion by Judge Winter joined by Judges Meskill and Straub, affirmed the District Court's dismissal of petitioners' claim.

Judge Winter's opinion began by considering the standard of review. As the court acknowledged, "[w]here a statute invidiously discriminates in granting the right to vote, we apply strict scrutiny in our review." 306 F.3d at 1259. The appeals court, however, quickly shifted gears. Relying on language from this Court's opinion in *Burdick v Takushi*, 504 U.S. 428 (1992), the appeals court noted that not all laws affecting the right to vote are subject to strict judicial scrutiny. Rather, strict scrutiny is limited only to laws that impose a "severe" restriction on voting rights. *See* 306 F.3d at 1259, *citing Burdick*, 504 U.S. at 434. Where a state election law imposes "only [a] 'reasonable, nondiscriminatory restriction[ ]' upon the rights of voters" it may be sustained if it advances "important regulatory interests." *See id., citing Burdick* at 434. Finding that the New York Election Law provisions were "reasonable, nondiscriminatory restrictions," the court of appeals applied the lower standard of review and upheld the one-residence rule. *Id.* at 1260.

In its discussion of the merits, the appeals court noted that New York's Election Law, like the election laws of most other states, treats "residence" as "synonymous" with "domicile." *Id.* at 1260-61. Although one may have multiple residences, "a person is deemed to have only a single domicile." *Id.* at 1260. Judge Winter's opinion acknowledged that "domicile is a very poor proxy for a voter's stake in electoral outcomes because many of an individual voter's varied interests are affected by outcomes in elections in which they do not vote." *Id.* at 1261. The court, however, contrasted a domicile rule with a registration eligibility rule based on the extent of an individual's interests in a community. The court concluded that an interests test "is not a manageable standard," whereas domicile, by limiting a person to a single voting place, provides a "workable" standard that has "enormous practical advantages." *Id.* at 1262. Indeed,

the court determined that election administration is "probably the dominant reason that domicile remains the dominant American method of determining where Americans may vote." *Id.* at 1263.

Of course, petitioners did not contend that they are entitled to vote in New York City because of a set of ill-defined interests. Rather, they predicated their claim on the fact that they are, in fact, residents of New York City. Indeed, although the court of appeals based its validation of the domicile ruling on administrative convenience, the court recognized that because petitioners maintain homes in two places they "are members of a class of persons that gives rise to administrative difficulties under the domicile rule." *Id.* at 1262. The court concluded that "New York has responded to this administrative difficulty in a pragmatic way," *id.* at 1262, by allowing people with two homes to "choose between them."

By contrast, the court of appeals found that allowing petitioners to vote in both of their home communities "would open the door to a host of administrative problems and potential abuses." *Id.* at 1263. The court found that a rule enabling petitioners to vote in local elections from each of their residences "would greatly increase the number of persons who might claim the right to vote in multiple elections, while thoroughly obscuring the line between valid and invalid claims." *Id.* "What is now a minimal problem [of determining residence] with the one-or-the-other rule, therefore, could become a major administrative problem without it." *Id.*

Due to the asserted administrative benefits of the requirement that petitioners may vote from just one residence—benefits that were merely assumed rather than analyzed, because no factual record had been developed in the proceedings before the district court—the court of

appeals concluded that New York's ban on voting in local elections from wherever one is a resident "does not in any sensible use of the word 'discriminate'" against people denied the right to vote in local elections from one residence because they also maintain, and vote, from a second residence. *Id.* at 1264.

REASONS FOR GRANTING THE WRIT

I. BY VALIDATING THE DENIAL OF THE RIGHT TO VOTE IN LOCAL ELECTIONS TO THE MILLIONS OF AMERICANS WHO MAINTAIN TWO HOMES, THE DECISION BELOW RAISES A QUESTION OF GREAT IMPORTANCE CONCERNING THE DEFINITION OF THE RIGHT TO VOTE

The central fact, not challenged by respondents or denied by either the district court or the court of appeals, is that petitioners are *bona fide* residents of New York City. Indeed, for purposes of considering respondents' motion to dismiss, and petitioners' appeal of the district court's grant of that motion, the respondents, the court and the reviewing courts are required to accept as fact petitioners' claims to be New York City residents. *See, e.g., Hughes v Rowe*, 449 U.S. 5, 10 (1980) (*per curiam*). In the words of this Court in an earlier case concerning the vital significance of residency in establishing constitutional protection of the right to vote, petitioners are "individuals who [a]re physically resident within the geographic boundaries of the governmental entity concerned." *Holt Civic Club v City of Tuscaloosa*, 439 U.S. 60, 68 (1978).

As residents of both New York City and Suffolk County, petitioners are among the large and growing number of Americans who maintain two homes. According to census data for 1995—the latest date for which

detailed information on this topic is available—nearly ten percent of American households, or more than nine million households, own or rent more than one residence. U.S. Census Bureau, *American Housing Survey, General Characteristics of U.S. Households* (1995). About 1.8 million households, or 1.9 percent of all households, reported that they divided their time so that both residences were their homes. *Id.* Frequently, the two homes are within less than a day's drive of each other. For sixty percent of the households with two residences, the two homes were not more than 150 miles apart. *Id.* For about 45% of the households with two residences, the second residence had been at one time the household's primary residence. *Id.*

A more recent survey focused on home ownership (without consideration of rentals) found that 5.6 million housing units were "extra" units owned in addition to the owner's usual residence. Three million of those "extra owned" units were considered "seasonal," while 2,594,000 were classified as "year-round" residences. The majority of both "seasonal" and "year-round" residences were within 150 miles of the current residence. *See American Housing Survey for the United States: 2001* (October 2002) at Table 1A-1.

Like other local residents, these second-home residents are directly and powerfully affected by the local governments that have jurisdiction over their homes. Local governments determine local property taxes, zoning and land use regulation, and the quantity and quality of police, fire, street cleaning, garbage removal, water supply, and other services local residents receive. Local residents, who happen to maintain other homes elsewhere, are just as affected by these local government decisions as other local residents. As a result, local residents—even those with second homes elsewhere—have

just as great a stake in local government actions as their fellow local residents who maintain a single home.

In a democratic society, a government's legitimacy is based on the ability of the people it governs to participate actively in the basic political decisions that shape their lives and in the election of the representatives who make and enforce the laws that regulate them. This Court has repeatedly recognized that the right to vote is "a fundamental right, because preservative of all rights," *Yick Wo v Hopkins*, 118 U.S. 356, 370 (1886), *Reynolds v Sims*, 377 U.S. 533, 562 (1964), *Harper v Virginia Board of Elections*, 383 U.S. 663, 667 (1966), *Dunn v Blumstein*, 405 U.S. 330, 336 (1972), *cf. Bush v Gore*, 531 U.S. 98, 104 (2000) (when a state legislature vests the right to vote for President in its people, the right to vote is "fundamental"). The right to vote is the crucial predicate for effective participation in democratic self-governance. The right to vote gives residents a voice in local politics and a crucial instrument for holding local officials accountable.

Without the vote, second-home residents may be effectively shut out of local politics. As a result, they may be discriminated against and forced to bear the brunt of adverse local fiscal, service, and regulatory decision-making. There is considerable evidence that localities do discriminate against second-home residents, and that second-home residents are increasingly aggrieved by their exclusion from the local polity. *See, e.g.*, Ellen Barry, *Second-Home Citizens: On Cape and Beyond, Seasonal Residents Fight to be Heard, Boston Globe*, Aug. 31, 2000, at A1; *Part-Time Residents Seek Full-Time Say, Record (N.J.)*, Aug. 21, 2000, at A3; John Flesher, *Part-Time Residents Feel Taxed by Laws, Grand Rapids Press*, Aug. 13, 2000, at A27; Fred Bayles, *'Seasonal' Residents Fight for Expanded Rights: Having a*

Say vs. Having to Pay Splits Several Vacation Towns, USA Today, May 23, 2000, at 6A; Blaine Harden, *Summer Residents Want a Year-Round Voice, N.Y. Times*, May 30, 2000, at A1. *See generally*, Note, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 *Colum. L. Rev.* 1954, 1954-58, 1962 (2002).

Despite their considerable stake in local government, second-home residents are generally denied the vote in their second-home communities. Many states explicitly specify that, for voting purposes, a person may be a resident of a single community. *See, e.g., Alaska Stat. Ann.* § 15.05.020(3)("[t]here can be only one residence"); *Ariz. Rev. Stat. Ann.* § 16-101(B) ("[a]n individual has only one residence for purposes of this title"); *Hawaii Rev. Stat. Ann.* § 11-13 ("[f]or the purpose of this title, then can be only one residence for an individual"). Some states require a person with more than one residence to select just one residence for voting purposes, *see, e.g., La. Rev. Stat. Ann.* § 18:101(B); ("[i]f a citizen resides at more than one place in the state . . . he may register and vote only at one of the places at which he resides"); *N.J. Stat. Ann.* § 19:4-4.2 (providing opportunity for registrant to make a sworn statement concerning domicile); provide election officials with criteria for selecting which one of multiple residences is to be the single residence for voting purposes, *see, e.g., West's Ann. Cal. Elec. Code* §§ 2031, 2032. Many states, like New York, simply use terms or phrases in their election laws like "that place" which define residence in such a manner that it is clear that there may be only a single voting residence. *See, e.g., Ind. Code Ann.* § 3-5-2-42.5; *Mich. Comp. Laws Ann.* § 168.11(1). *See generally* Note, *Dual Resident Voting, supra*, 102 *Colum. L. Rev.* at 1954-55.

To be sure, a handful of states do permit second-home residents to vote in a limited number of special district elections, *see id.* at 1957, or permit local governments to extend the franchise to second-home residents at the locality's discretion, *see id. See also May v Town of Mountain Village*, 132 F.3d 576 (10th Cir. 1997) (upholding against constitutional challenge a local law authorizing nonresidents who own real property in the locality to vote in local elections); *Spahos v Mayor and Councilmen of Town of Savannah Beach*, 207 F. Supp. 688 (S.D. Ga.), *aff'd*, 371 U.S. 206 (1962) (*per curiam*) (rejecting federal constitutional challenge to enfranchisement of nonresident property owners). But in the vast majority of states and localities, individuals may vote only from a single residence.

As a result, second-home residents are consistently barred from voting in one of the communities in which they live. This leaves them much less able than other local residents to protect their interests and effectively denies them a fundamental aspect of citizenship—the right to participate on an equal basis with their neighbors in local self-governance.

II. By Failing to Subject New York's Law to Strict Judicial Scrutiny, the Court Below Broke with this Court's Precedents in Cases Involving the Right to Vote

This Court has repeatedly held that when a law that discriminates among local residents by permitting some to vote while denying the franchise to other, similarly situated residents is challenged under the Equal Protection Clause the law must be subject to strict judicial scrutiny and must be invalidated unless the State has demonstrated that its restriction on the franchise is nec-

essary to achieve a compelling state interest. *See, e.g., Harper v Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) ("classifications which might invade or restrain" the right to vote "must be closely scrutinized and carefully confined"); *Kramer v Union Free School Dist. No. 15*, 395 U.S. 621, 628 (1969) (applying "exacting judicial scrutiny of statutes distributing the franchise"); *Evans v Cornman*, 398 U.S. 419, 422 (1970) ("before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny"); *City of Phoenix v Kolodziesjki*, 399 U.S. 204, 209 (1970) (excluding some otherwise qualified citizens from the franchise "can be justified only by some overriding interest"); *Dunn v Blumstein*, 405 U.S. 330, 343 (1972) (in an equal protection challenge to a voting restriction that denies some residents the franchise "a heavy burden of justification is on the State, . . . and . . . the statute will be closely scrutinized in light of its asserted purposes.").

As the Court explained in *Kramer*, strict scrutiny is required in cases denying the franchise to some otherwise qualified voters because discriminatory voting laws subvert the democratic legitimacy which is the basis for judicial deference to state and local laws: "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to fairly represent all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." 395 U.S. at 628.

Strict judicial scrutiny is appropriate for state laws that limit the franchise in local elections even if the state

legislature is fairly elected: "Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting." *Id.* Where a local government like a city exercises "general responsibility and power for local affairs" and has "general governmental powers," *Avery v Midland County*, 390 U.S. 474, 483, 485 (1968), then laws limiting the local election and discriminating among local residents must be subject to strict judicial scrutiny.

In this case, however, the court of appeals failed to apply strict judicial scrutiny to New York's law. Rather, after an initial nod in the direction of strict scrutiny, 306 F.3d at 1259, the court applied a less restrictive standard of review, ultimately sustaining New York's law as "reasonable." In so doing, the court relied on this Court's decision in *Burdick v Takushi*, 504 U.S. 428 (1992), rejecting the notion that "a law that imposes *any* burden upon the right to vote must be subject to strict scrutiny." *Id.* at 432 (emphasis supplied). Rather, as *Burdick* explained, only laws that impose a "severe" restriction on the vote will receive strict scrutiny; less burdensome laws will receive less exacting review.

Burdick, however, involved the right of a qualified voter to cast a write-in vote. The Hawaii law banning write-ins at issue in *Burdick* may have burdened the vote but it did not deny anyone the right to vote. This Court has consistently held that a law flatly denying the vote to otherwise qualified adult, resident citizens is the most "severe" restriction a state can impose on the vote. Such a law is subject to strict judicial scrutiny, and will be sustained only if necessary to achieve a compelling state

interest. *See, e.g., Kramer, supra; Dunn, supra.* Less exacting review, in which an election law will be sustained if it is reasonable and linked to an important state interest, has been limited to laws, such as the write-in ban in *Burdick*, that merely limit the choices available to voters or parties but that do not deny the vote outright. *See, e.g., Timmons v Twin Cities Area New Party*, 520 U.S. 351, 358-61 (1997) (applying *Burdick* to anti-fusion law that limited party's choice of candidate; where party is free to participate in the electoral process, endorse whom it pleases, and nominate candidates to office, anti-fusion law "does not severely burden that party's associational rights").

New York's law denies petitioners the franchise in New York City. If petitioners were to re-register to their New York City homes, the New York law would deny them the right to vote in local elections in Suffolk County. Yet, petitioners are residents of both New York City and Suffolk County and have continuing, significant and legitimate ties to both places. The New York law thus places a "severe" restriction on their voting rights under *Burdick*. The court of appeals erred in applying a more deferential standard of review.

III. AS APPLIED TO PETITIONERS AND OTHER PERSONS WHO MAINTAIN TWO RESIDENCES, NEW YORK'S LAW CANNOT SURVIVE STRICT JUDICIAL SCRUTINY

The court of appeals relied exclusively on administrative convenience in determining that New York's single-place-of-voting rule passes constitutional muster. The court wisely ignored the arguments of respondents below that enfranchising petitioners to vote in local elections in both New York City and Suffolk County would somehow constitute unconstitutional "dual voting."

Enfranchising petitioners to vote in local elections in New York City and Suffolk County would not result in dual voting in the same election. Rather, petitioners would be registered to vote just once in each of two different local elections. Two votes at the local level in two different jurisdictions, with two completely different sets of offices at stake, is not dual voting in one local election. *See also* Note, *Dual Resident Voting, supra*, 102 Colum. L. Rev. at 1963.

Nor did the court find that there is anything in the nature of voting that requires that a person be allowed to vote in only one jurisdiction. As the court noted in analyzing the "concept of domicile . . . the principal usefulness of the concept is that it resolves jurisdictional issues in circumstances in which exclusivity is desirable or necessary, such as probating an estate." 306 F.3d at 1260. Yet, voting in local elections is nothing like probating an estate. It is crucial for the law of estates that the law of a single jurisdiction apply to a particular estate lest different state laws lead to inconsistent and conflicting rules for the distribution of the estate. But there is no comparable need to limit a citizen to voting in only one set of local elections. If petitioners were entitled to vote in local elections in both Suffolk County and New York City, local elections in each community would not be disturbed or confused. Their participation would not impair the ability of either community to administer its elections. Indeed, as previously noted, some jurisdictions permit second-home voting, without apparent adverse consequences to the ability of either first- or second-home communities to run their elections. *See May, supra; Spahos, supra; see also* Alexander Keyssar, *The Contested History of Democracy in America* 6 (2000) (noting that early in American history, when the franchise was based on property ownership, voting in multiple communities was permitted).

Nor did the court of appeals justify limiting the vote in local elections to a single place on the theory that an individual can be interested in or affected by the governance of just a single community. The court rejected this argument when it labeled "an oversimplification" the contention that domicile is "a close proxy for determining the election district in which a voter has the greatest stake in the outcome of elections." As the court of appeals observed, "[p]articularly in modern times, domicile is very often a poor proxy for a voter's stake in electoral outcomes because many of an individual voter's varied interests are affected by outcomes in elections in which they do not vote. . . . There are endless examples of the bad fit between domicile and a voter's interest in electoral outcomes." 306 F.3d at 1261. This is particularly true today with the large and increasing number of Americans who maintain two homes.

Rather, the court of appeals relied solely on administrative convenience in validating New York's law. *See id.* at 1261-63. Petitioners recognize that administrative convenience is a legitimate and important concern for state election laws. But, with respect to petitioners and other people eligible to vote from either of two residences, a law limiting the local vote to a single place is not narrowly tailored or strictly necessary to accomplish that state goal.

With respect to petitioners and other similarly situated residents of two communities, New York's law is both overinclusive and poorly matched to the goal of minimizing administrative difficulties. It is overinclusive because petitioners do not assert the right to vote in New York City simply because they have interests in New York City. Rather, petitioners are residents of New York City. The state would permit them to reregister in New York City provided they drop their registrations in Suf-

folk County (where they are also residents). The question of whether petitioners are residents of New York City is no different from the question presented by any other persons claiming to be residents of any community—either they maintain a home in the community or they do not. Each petitioner, as the state has acknowledged, maintains a home in New York City. The state has alleged no special administrative difficulties in determining whether plaintiffs are residents of New York City. Hence, with respect to the goal of minimizing administrative difficulties, New York's law is overinclusive as applied to petitioners.

Indeed, when applied to people with two residences New York's law is, in general, poorly matched to the goal of minimizing administrative difficulties since it creates difficulties rather than avoids them. Under New York's law, when a person has two homes both the registrant and the registrar must address the often knotty problem of determining which is the registrant's "principal" or "primary" residence. Other states have been required to devote significant statutory attention to that question. *See, e.g., West's Ann. Cal. Elec. Code* §§ 2031, 2032. That administrative complication simply does not arise if a person with two homes may vote in local elections in both communities in which he or she maintains a residence.

New York's single-place-of-voting rule may be, as the court of appeals concluded, a "reasonable" and "pragmatic" means of generally reducing the administrative burdens on election registrars. But where the right to vote is at stake "the issue is not whether the legislative judgments are rational. A more exacting standard obtains." *Kramer v Union Free School Dist., supra*, 395 U.S. at 633. A justification of administrative convenience which might pass muster under a more deferential

standard of review will fail if strict scrutiny is applied and the justification is not necessary or narrowly tailored to a compelling state interest.

This case is very similar to the durational residency requirement invalidated by this Court in *Dunn v Blumstein, supra*. The state argued that the durational requirement would promote "the purity of the ballot box" by protecting against fraud and increase the likelihood that voters were knowledgeable about local conditions. The Court accepted these as legitimate goals in election law, but found that when strict scrutiny was applied, the durational residency requirement did not satisfy "the exacting standard of precision we require." 405 U.S. at 360.

In this case, too, when strict scrutiny is applied, it is clear that the single-place-of-voting rule is not tied to the goal of administrative convenience so closely as to justify the denial of the right to petitioners, who are unquestionably residents of New York City.

IV. Supreme Court Action Is Necessary to Vindicate Petitioners' Constitutional Rights

Petitioners candidly acknowledge that this case lacks one of the important indicators of "cert-worthiness"—the existence of a conflict among the federal courts of appeals. The Second Circuit's decision is the only federal court decision to address the constitutionality of the prohibition on voting in local elections from two homes. The issue, however, is ripe for Supreme Court action. Indeed, Supreme Court action is necessary to vindicate the constitutional rights of petitioners and the many other citizens who have more than one residence.

The court of appeals' decision is significant because it is the first federal judicial decision to legitimate the denial of second-home voting rights, and to reach that

outcome by applying a less-than-strict standard of review. Although the voting rights of second-home residents have generally been denied by state laws and local administration, the Second Circuit's decision for the first time places the imprimatur of the courts on this practice. As a result of the court of appeals' decision, disfranchisement of second-home residents has now been legitimated as constitutional.

More importantly, the court of appeals' decision demonstrates that the Supreme Court's leadership is necessary to address this important question of voting rights. Although the case involves a law flatly denying residents the right to vote in second-home localities, the court of appeals declined to apply strict judicial scrutiny. Although the court of appeals rested its validation of the law on administrative concerns, the court did not explain why, for persons with two homes, a two-residence voting rule is less administrable than a single-place-of-voting rule, given that the two-residence rule obviates the need to decide which residence is the primary residence. So, too, despite the centrality of administrative concerns to its analysis, the court of appeals affirmed the district court's grant of a motion to dismiss the complaint, thus precluding the discovery and other factual development, not to speak of a full trial in which petitioners could offer evidence on the question of administrability.

This case demonstrates the tension between such a widespread feature of election law as the single-home voting rule and the Equal Protection Clause. This Court has repeatedly emphasized the fundamental nature of the right to vote in one's community of residence and required that laws restricting the rights of otherwise qualified residents to vote be subject to the most exacting review. At a time when millions of Americans maintain two residences, the single-home voting rule limits

the ability of second-home residents to participate on an equal basis with their neighbors in local self-governance and it exposes them to discrimination and exploitation in local taxation, regulation and service delivery. It is apparent that this Court's leadership will be necessary if the laws restricting the voting rights of petitioners and millions of other similarly situated Americans are to receive the strict judicial scrutiny that this Court's voting rights jurisprudence requires.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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